

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5598 of 1989

with

SPECIAL CIVIL APPLICATION No 3224 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

JANAKRAI L CHHAYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5598 of 1989
MR PV HATHI for Petitioner
MR M.A.BUKHARI,AGP for Respondent No. 1
 2. Special Civil ApplicationNo 3224 of 1993
MR PV HATHI for Petitioner
MR M.A.BUKHARI,AGP for Respondent No. 1
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CORAM : MR.JUSTICE C.K.THAKKAR

Date of decision: 11/04/2000

ORAL JUDGEMENT

Both these petitions are filed by the same petitioner and the questions raised in both of them are also inter-related. It is ,therefore, convenient to dispose of both the petitions by a common judgment.

SCA No. 5598 of 1989 is filed by the petitioner for quashing and setting aside the order dated 13th June, 1989 by which the petitioner was reverted from the post of Sanitary Inspector to the post of Vaccinator, and a consequential order, dated 21st June, 1989 and for a declaration that he was exempted from passing Sanitary Inspector's Examination and was entitled to promotion as Sanitary Inspector without passing such examination. A prayer is also made to direct the respondent authorities to promote the petitioner as Sanitary Inspector and to grant all consequential benefits including arrears of pay, seniority, etc.

SCA No. 3224 of 1992 is filed for a declaration that the respondent authorities were bound to consider the case of the petitioner for promotion as Sanitary Inspector as per criteria prescribed in accordance with Government Notification, dated 27th January, 1992 Annexure 'A' and to quash and set aside the circular, dated 11/17th March, 1993 issued by the Government as illegal, ultra vires and violative of Fundamental Rights guaranteed under Articles 14 and 16 of the Constitution.

The case of the petitioner is that he was appointed as Vaccinator and was working with the District Panchayat, Kutch at Bhuj . Next promotional post from the post of Vaccinator was Sanitary Inspector. As the petitioner was working as Vaccinator , his case was required to be considered for promotion to the post of Sanitary Inspector. The respondent authorities, however, did not consider his case for promotion presumably on the ground that the petitioner was working in Panchayat service and employees working in Panchayat service were not treated as eligible for promotion in accordance with Sanitary Inspector (Public Health Department) Recruitment Rules, 1972 (hereinafter referred to as '1972 Rules') framed under the proviso to Article 309 of the Constitution. The petitioner contended that Panchayat service was also State service and there was no earthly reason to consider Panchayat employees as ineligible for promotion and the action of the respondent was arbitrary, unreasonable and violative of Articles 14, 16 and 19 of the Constitution.

According to the petitioner, even the respondent authorities were satisfied about the legitimate grievance of the petitioner and he was promoted as Sanitary Inspector vide an order dated 29th April, 1989 , Annexure 'C' to SCA No. 5598 of 1989. In the said order, it was stated that as per Notification issued by the State Government and in accordance with the provisions of 1972 Rules as amended by Sanitary Inspector (Public Health Department) Recruitment (Amendment) Rules, 1986 (hereinafter referred to as '1986 Rules'), a Vaccinator who had put in ten years or more service as a Vaccinator was exempt from passing Sanitary Inspector's Examination for promotion to the post of Sanitary Inspector. It was also observed that there was some doubt as to whether the notification would apply to Panchayat Employees or not. For the said purpose, a clarification was sought from the Government but in spite of letters and telegrams, no such clarification was made by the Government. Meanwhile, the petitioner had gone on fast as he was not promoted and in such circumstances, as per advice given by the Legal Department of the District Panchayat, Kutch at Bhuj, it was thought proper to grant conditional promotion to the petitioner and accordingly, he was promoted as Sanitary Inspector on certain terms and conditions. One of the terms specifically stated that if statutory rules would not apply to Panchayat employees, the petitioner would be reverted to his original post of Vaccinator. The promotion was purely temporary and without any right to hold the post. It was also stated that if promotion of the petitioner will not be held to be legal, he will be reverted and refund the salary which he had received on promotional post.

It appears that meanwhile, on coming to know that the petitioner was promoted from Vaccinator to Sanitary Inspector, Vaccinators in the State Cadre filed SCA No. 1228 of 1989 contending that Panchayat employees could not be promoted and the action was illegal. Taking into account the said petition and challenge by the State employees, an order at Annexure 'D' dated 13th June, 1989 to SCA 5598 of 1989, was passed by the District Panchayat by which the petitioner was reverted to his substantive post of Vaccinator. By a consequential order dated 21st June, 1989, he was relieved from the post of Sanitary Inspector.

Both the petitions were admitted and rule was issued. I have heard Mr. P.V.Hathi for the petitioner and Mr. Bukhari, learned AGP for the respondents.

Mr. Hathi contended that the petitioner was a panchayat

employee. As held by the Supreme court in several cases including the leading decision in State of Gujarat vs. R.K.Soni, AIR 1984 SC 161, all panchayat employees are State employees and hence, the authorities have committed an error of law and of jurisdiction in not granting all the benefits which were extended to State employees. Said action is illegal, ultra vires and liable to be set aside. He also submitted that it is true that statutory rules framed under the Proviso to Article 309 of the Constitution on 21st September, 1972 as amended on 7th June, 1988 were not specifically made applicable to the panchayat employees, but as panchayat employees are State employees, those rules ipso facto apply to panchayat employees. But that apart, the State had passed a resolution in the name of Governor of Gujarat on 14th August 1981 (Annexure 'F' to SCA 5598 of 1989) wherein it was clearly, specifically and unequivocally mentioned that all rules and regulations of Government would apply to panchayat employees and it was not necessary to issue separate circular and/ or resolution.

Relying on the said resolution, Mr. Hathi contended that since the resolution has been issued by and in the name of the Governor of Gujarat, it can be said to be a statutory rule and to that extent, 1972 Rules applicable to State employees were applied to the panchayat employees as well.

In the alternative, Mr. Hathi submitted that even if it is assumed for the sake of argument that the circular dated 14th August, 1981 is in the nature of administrative instructions and not statutory rule, it is well settled principle of law that administrative instructions cannot run counter to the statutory rules and cannot be inconsistent with them but it can fill in the gap and can extend ambit and scope of such rules. When the statutory rules were applied to Government employees, it was open to the State Government to extend application of those rules and to extend benefits to the panchayat employees also. Such action was, therefore, clearly legal, valid and permissible. The impugned action of reversion of the petitioner was, therefore, illegal and contrary to law.

In the second petition, viz. SCA 3224 of 1993, the grievance of the petitioner was that once statutory rules were framed in exercise of the powers under Section 323 read with Section 203 (3) of the Act, known as Gujarat Panchayat Service (Classification and Recruitment) Rules, 1967 as amended by Gujarat Panchayat Service (Classification and Recruitment) (Amendment) Rules, 1992

by specifically dealing with promotion from the post of Vaccinator to the post of Sanitary Inspector by granting exemption from passing Sanitary Inspector's Examination to those Vaccinator who had put in ten years or more service, it was not open to the State Government to issue circular dated 11th/17th March, 1993 at Annexure 'B' to the petition that Vaccinators who had been exempted from passing the examination will be promoted only when Vaccinators who had passed the examination were not available . It was contended that the circular must be held to be contrary to law , inconsistent with the statutory rules and requires to be declared as ultra vires . The petitioner would be entitled to promotion on the basis of statutory rules and he cannot be denied the benefit to which he was otherwise entitled.

Mr. Bukhari, learned AGP, on the other hand, supported the action taken by the authorities. He submitted that Government rules were not applicable to panchayat employees and the petitioner who was in panchayat service could not claim benefits of those rules. The petitioner was, therefore, rightly not promoted to the post of Sanitary Inspector. When he had proceeded on fast, the panchayat authorities were compelled to promote him as Sanitary Inspector but in view of filing of SCA No, 1228 of 1989 by the State employees, the Government made the position clear and the petitioner was reverted to his substantive post of Vaccinator. There was no illegality in reverting him. It was also submitted that the petitioner had not passed the relevant examination and hence, he was not entitled to promotion as Sanitary Inspector. Regarding circular dated 14th August, 1981, he submitted that such circular cannot override Statutory Rules and the action of the authorities cannot be said to be illegal. Regarding circular dated 11/17th March, 1993, he submitted that the Government had clarified that though exemption was granted from passing examination as Sanitary Inspector, all those Vaccinators who had passed the examination of Sanitary Inspectors should be promoted first and such decision cannot be said to be arbitrary or unreasonable. As there was misunderstanding prevailing in certain quarters, circular was issued which cannot be held to be contrary to Statutory Rules at Annexure 'A'. He, therefore, submitted that both the petitions deserve to be dismissed.

In my opinion, both the petitions deserve to be allowed partly. So far as SCA 5598 of 1989 is concerned, it is not in dispute by and between the parties that the petitioner was in Panchayat Service. He was serving as a Vaccinator in the District Panchayat. It is also not in

dispute that the Government, in exercise of powers under the Proviso to Article 309 of the Constitution, framed rules known as Sanitary Inspector (Public Health Department) Rules, 1972. Rule 2 provides that appointment to the post of Sanitary Inspector in the subordinate service in Public Health Department shall be made by promotion of a person of "proved merit and efficiency" from among the persons working as Vaccinators of BCG Technicians who have passed Sanitary Inspector's Examination. Of course, by a notification issued again in exercise of powers under the Proviso to Article 309 of the Constitution, the above rule was amended and further proviso was added that Vaccinator who had put in ten years or more service as a Vaccinator would be exempted from passing Sanitary Inspector's examination, if any, for promotion to the post of Sanitary Inspector.

Two questions arise for my consideration:

(i) whether Recruitment Rules of 1972 as amended in 1988 would apply to Panchayat Employees; and

(ii) If yes, whether the petitioner was eligible to be promoted to the post of Sanitary Inspector.

Now, so far as the first question is concerned, Mr. Hathi submitted that on three grounds, State Rules would apply to Panchayat Employees:

Firstly, as held by the Supreme Court in R.K.Soni, all panchayat employees are State employees; and hence, they are entitled to benefit of State Rules

Secondly, the resolution, dated 14th August, 1981 was issued by and in the name of the Governor of Gujarat and thus virtually issued in exercise of power under the proviso to Article 309 of the Constitution;

Thirdly, even if the resolution, dated 14th August, 1981 was in the nature administrative instructions, it was complementary to the Rules and not contrary to or inconsistent with the statutory rules. It can, therefore, be enforced.

Now, so far as issuance of resolution by and in the name of the Governor of Gujarat is concerned, I do not wish to express final opinion as, in my view in the facts and circumstances, it is not necessary in the instant case. Prima facie, Mr. Hathi is right in submitting that when panchayat service is held to be State service, 1972 Rules should apply to panchayat employees also. But even that

point also may not be finally concluded in the facts and circumstances of the present case as, in my opinion, alternative argument of Mr Hathi is well founded viz. that the circular dated 14th August, 1981 is not contrary to or inconsistent with the statutory rules but it merely fills the gap. Statutory Rules of 1972 as amended in 1988 applicable to State employees were made applicable to Panchayat employees by the State Government by taking a policy decision that all resolutions, circulars, rules and regulations applicable to State employees would also apply to Panchayat employees without a specific resolution, circular or policy decision to that effect. Such action could have been taken by the State authorities and when that action was taken, it cannot be said that it was contrary to law. Hence, it can be said that the petitioner was entitled to get benefit of 1972 rules as amended in 1988 and he could be promoted on the basis of those statutory rules.

Now, rule 2 of 1972 Rules read as under :

"2. Appointment to the post of sanitary inspector in the subordinate service of the Public Health Department shall be made by promotion of a person of proved merit and efficiency from amongst the persons working as vaccinators or BCG technicians and who have passed sanitary inspector's examination.

Provided that if vaccinators or BCG technicians who may have passed sanitary inspector's examinations are not available, vaccinator BCG technicians, who have passed the secondary School Certificate Examination and have put in at least five years service as vaccinator or BCG technician may be promoted subject to the condition that such promotees shall have to pass the sanitary inspector's examination or Basic Health Workers examination, within a period of 2 years from the date of promotion."

Hence, the case of the petitioner could be considered on the basis of the test laid down in Rule 2 of "proved merit and efficiency". Rule 2, as it originally stood, provided passing of Sanitary Inspector's Examination. But a Proviso was added with effect from 7th June, 1988 which read as under:

"Provided further that the vaccinators who have put in ten years or more service as vaccinator should be exempted from the passing of sanitary inspector examination, if any, for the purpose of promotion to the post of the sanitary inspector".

The petitioner was appointed as Vaccinator on August 22, 1968 and he had completed ten years in 1978 . Exemption from passing of examination by Vaccinators who had completed ten years or more as Vaccinator was introduced for the first time in June, 1988. Hence, the case of the petitioner was required to be considered for promotion from Vaccinator to Sanitary Inspector in accordance with 1972 rules as amended in 1988 with effect from 7th June, 1988 and that too on the test of "proved merit and efficiency", and the petitioner, therefore, is entitled to that relief.

For the aforesaid reasons, SCA No. 5598 of 1989 deserves to be partly allowed by directing the State authorities to consider the case of the petitioner for promotion from the post of Vaccinator to the post of Sanitary Inspector on the basis of 1972 rules as amended in 1988 with effect from 7th June, 1988 and on "proved merit and efficiency" If the petitioner is held fit to promotion , he will be entitled and granted all benefits except monetary benefits on the basis of such promotion.

SCA No. 3224 of 1993: After the above Rules of 1972 as amended in 1988 which were applicable to State employees, it appears that State Government framed specific rules for panchayat employees in 1992. Rule 2 is relevant and it reads as under :

"2. In the Gujarat Panchayat Service (Classification and Recruitment) Rules, 1967 (hereinafter referred to as "the said rules"), in Schedule IV, under the heading "Public Health Branch" under the sub-heading "Executive", in the entry "3- Senior Sanitary Inspectors or Sanitary Inspectors", for rule (1), the following shall be substituted, namely:

"(1) Appointment to the post of Sanitary Inspector shall be made by promotion according to the seniority and merits from amongst the persons working on the cadre of Sanitary Sub Inspectors and in absence of a suitable person available on the cadre of Sanitary Sub Inspectors , appointment

may be made from amongst the persons working as vaccinators:

Provided that the vaccinators who have put in ten years or more service as vaccinator shall be exempted from passing of Sanitary Inspector's Examination ,for being considered for promotion to the post of the Sanitary Inspector."

From the above rule, it is clear that the criteria for promotion to the post of Sanitary Inspector in Panchayat Service is different than the promotion in State Service. Instead of "proved merit and efficiency" in the State Service, the test of "seniority and merits" from amongst the persons working on the cadre of Sanitary Sub Inspectors or Vaccinators" has been applied. 1992 Rules are also statutory inasmuch as they were framed in exercise of powers conferred under Section 323 read with sub section (3) of Section 203 of the Act, and they will apply to Panchayat employees from 1992 onwards. Hence, from 27th January, 1992, the test for giving promotion as Sanitary Inspectors is "seniority and merits" and not "proved merit and efficiency". Proviso to sub-rule (2) clarifies that Vaccinators who had put in ten years or more service as Vaccinators shall be exempted from passing Sanitary Inspector's Examination for being considered for promotion as Sanitary Inspector. I find considerable force in the argument of Mr. Hathi that once exemption is granted from passing examination, such person should be treated at par with an employee who has passed the examination. It is, therefore, not open to the authorities to make artificial classification between Vaccinators who had passed the examination and vaccinators who had been exempted from passing such examination. In my opinion, therefore, the contention of Mr. Hathi that the resolution issued by the Government on 11th/17th March , 1993 that preference will be given to those Vaccinators who had passed Sanitary Inspector's Examination is contrary to and inconsistent with Statutory Rules . It is settled law that when administration instructions run counter to the statutory rules, they cannot operate and accordingly, the resolution at Annexure 'B' dated 11th/ 17th March, 1993 must be held to be ultra vires the rules and hence is unconstitutional.

The resultant effect is that after 1992, the case of the petitioner will have to be considered by the authorities in accordance with Rule 2 of the Gujarat Panchayat Service (Classification and Recruitment) (Amendment)

Rules, 1992 for giving promotion from the post of Vaccinator to the post of Sanitary Inspector by keeping in mind the fact that Vaccinators who had put in ten or more years of service are exempted from passing Sanitary Inspector's Examination. Once such exemption was granted, they will be treated at par with Vaccinators who had passed the examination and artificial classification between Vaccinators who have passed the examination and Vaccinators who have been exempted from passing examination must be held to be artificial, illegal and contrary to law. On the basis of seniority and merit of Vaccinators, the case of the petitioner will be considered from 27th January, 1992 and if he is found fit and suitable on the basis of the said test, his case will be considered and he will be entitled to promotion and will be entitled to all consequential benefits except back wages.

Both the petitions are, therefore, partly allowed to the above extent. There shall be no order as to costs. Since the grievance of the petitioner relates to 1989 and since he is holding the post of Vaccinator from the date of his initial appointment in 1968 and more than thirty years have passed, the authorities will take appropriate decision in accordance with law within six months from the receipt of the writ. Order accordingly.

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